**U.S. Department of Labor**

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

**Issue date: 23Apr2002**

| | | |
|---|---|---|
| In the Matter Of | : | |
| | : | Case No. 1995-BLA-01765 |
| TEDDY J. WHITED | : | |
| Claimant, | : | |
| | : | |
| v. | : | |
| | : | |
| RHONDA COAL COMPANY, INC., | : | |
| | : | |
| Employer, | : | |
| | : | |
| and | : | |
| | : | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, | : | |
| | : | |
| Party-in-Interest | : | |

## DECISION AND ORDER

On April 10, 2001, the Benefits Review Board (the Board) issued a Decision and Order, affirming in part and vacating in part, my Decision and Order of March 7, 2000, and remanding the case for further consideration consistent with its opinion. Specifically, the Board affirmed the finding that no mistake in a determination of fact had been made in the prior Decision and Order, which was the subject of the request for modification, remanding this matter, however, for further consideration of the issue of whether the Claimant had established a change of condition pursuant to Section 725.310.[1]

In my Decision and Order, I determined that the Claimant had in fact established a change in condition inasmuch as the newly submitted evidence was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant

[1] Claimant initially filed for benefits on October 25, 1994. It was denied by Administrative Law Judge Edith Barnett on December 5, 1996. The Claimant appealed that decision to the Board. On December 4, 1997, the Board affirmed the denial of benefits. Claimant filed a request for modification and by Decision and Order dated March 7, 2000, I found Claimant to be entitled to benefits.

to 20 C.F.R. Section 718.304. In so doing, I accorded greatest weight to the newly submitted report of Dr. Navani, wherein he found the March 11, 1998, CT scan of the miner's chest to be indicative of pneumoconiosis, category A.

In remanding this matter, the Board held as follows:

> In the present case, the administrative law judge did not refer to the previously submitted evidence when considering the credibility of the newly submitted evidence pertaining to the existence of complicated pneumoconiosis. This omission is particularly relevant in the present case in which Drs. Castle and Wheeler characterized the sudden appearance of apical masses as inconsistent with a diagnosis of complicated pneumoconiosis.

The Board also noted, with respect to my findings under Section 718.304, that subsequent to the issuance of my decision and order, the United States Court of Appeals for the Fourth Circuit, under whose jurisdiction this case arises[2] held that an administrative law judge must weigh the evidence at Section 718.304(a),(b), and (c) together before determining whether the irrebuttable presumption of total disability due to pneumoconiosis has been invoked. See Eastern Associated Coal Corp. v. Director, OWCP,[Scarbro] 220 F.3d 250 (4th Cir. 2000). The Board also noted that the Court requires the administrative law judge to consider whether the types of evidence referenced in Section 718.304(b)and (c) would produce results equivalent to opacities greater than one centimeter in size on a chest x-ray as described in Section 718.304(a). See Double B Mining Co. v. Blankenship, 177 F.3d 240 (4th Cir. 1999). Therefore, the Board remanded this matter for reconsideration of the medical evidence relevant to the issue of invocation of the irrebuttable presumption pursuant to Section 718.304, in light of this case law.

Finally, the Board held that I should consider whether reopening the present case would render justice under the Act. Upon remand, all parties were afforded the opportunity to file additional comments in light of the issues raised by the remand. The Employer filed a Brief on Remand.

---

[2] The Benefits Review Board has held that the law of the circuit in which the Claimant's last coal mine employment occurred is controlling. Shupe v. Director, OWCP, 12 BLR 1-200 (1989). The Claimant's last coal mine employment took place in Virginia, which falls under the jurisdiction of the Fourth Circuit.

## DISCUSSION

### Modification

As noted, the Claimant herein requested modification of the denial of benefits. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and as implemented by 20 C.F.R. §725.310, provides that upon a miner's own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits or any time before one year after the denial of a claim, reconsider the terms of an award of a denial of benefits. §725.310(a).

The Fourth Circuit Court of Appeals has held that a modification petition need not specify any factual error or change in conditions, and indeed, the claimant may merely allege that the ultimate fact - total disability due to pneumoconiosis - was mistakenly decided and request that the record be reviewed on that basis. Jessee v. Director, OWCP, 5 F.3d 723 (4th Cir. 1993).

In determining whether a change in conditions has occurred requiring modification of the prior denial, the Board has stated that

> the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision.

Kingery v. Hunt Branch Coal Co., 19 BLR 1-6 (1994). Furthermore,

> if the newly submitted evidence is sufficient to establish modification..., the administrative law judge must consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits of the claim.

Kovac v. BCNR Mining Corp., 14 BLR 1-156 (1990), modified on recon., 16 BLR 1-71 (1992).

In her Decision and Order of December 5, 1996, Judge Barnett determined that the miner had established the existence of pneumoconiosis, but that he had failed to establish total

disability due thereto. In its decision dated December 4, 1997, the Board affirmed the denial of benefits. The discussion and analysis of the medical evidence submitted and considered in the Claimant's previous denial, as rendered by Judge Edith Barnett and affirmed by the Board, are hereby incorporated into this decision on modification. While this evidence has been reviewed and will be considered in analyzing the Claimant's present request for modification, it will not be unduly repeated herein.

Newly submitted since the prior denial were readings of a CT scan performed on March 11, 1998. Dr. Naik's interpretation was as follows:

> Old granulomatous disease. Extensive pattern of background fine interstitial lung changes of the reticular type, primarily in the upper and mid lung regions along with what appears to be PMF type formation in the right apical region. The latter is a progression and conglomeration of nodules noted on prior CT scan of October 4, 1994. The primary disease process would be consistent with pneumoconiosis.

(DX 60).

Dr. Navani read that same scan as follows:

> Multiple images reveal numerous uncalcified micronodules, diffusely distributed on both sides involving all six zones. There is a tendency to coalescence. Multiple round areas of diminished attenuation represent associated emphysematous changes....There is ill-defined and irregular large confluent density in the right upper zone representing complicated coal worker's pneumoconiosis.
> CT appearances are consistent with coal worker's pneumoconiosis that approximates to q/r-2/1, A, em au, tb.

(DX 61).

Dr. Wheeler read the March 11, 1998, CT scan as follows:

> Well defined 5x3 cm mass in subapical portion RUL and lower right apex and 3x1 mass upper left apex compatible with conglomerate TB with tiny calcified granuloma in medial portion RUL mass. Nodules and irregular scars in both apices and subapical portion RUL>LUL and pleura compatible TB unknown activity.

(Er. Ex. 2)

A February 9, 1999, CT scan was interpreted by Dr. Wheeler as follows:

> Ill defined 6 cm mass or infiltrate in subapical portion RUL and few small ill defined masses and nodules in apices and lateral periphery RUL compatible with granulomata and conglomerate TB, probably healed but check for active disease. Small calcified granuloma in lateral portion left mid lung due to healed TB more likely than healed histoplasmosis.

In a report regarding a February 9, 1999 chest x-ray, Dr. Wheeler found as follows;

> TB with conglomerate mass in subapical portion RUL and left apex and calcified granulomata in left hilar nodes as well as nodules and scars in RUL>LUL including periphery and pleura all compatible with TB unknown activity, probably healed.
> Small calcified granuloma in lateral portion left mid lung due to healed TB more likely than healed histoplasmosis.

(Er. Ex. 2)

Dr. Scott read the CT scan dated March 11, 1998, as well as the chest x-ray of that date, as indicative of multiple calcified granulomata in mediastinum, lungs and spleen compatible with healed TB or histoplasmosis. (Er. Ex. 4) He found 1 cm masses RML and posterior LLL which most likely represented non-calcified granulomata, but cancer could not be excluded. Dr. Scott also found masses and nodular infiltrates/fibrosis both apices, right more than left, with extension to pleura most compatible with tuberculosis, unknown activity. He read the February 9, 1999 CT scan and the chest x-ray of that date, as revealing bilateral apical masses with scars extending to the pleura, greater on the right than the left, these being most compatible with granulomatous masses due to TB, unknown activity. (Er. Ex. 4) He also noted a 1 cm calcified granuloma left mid-lung and calcified granulomata mediastinum, compatible with healed TB.

Also submitted since the prior denial are numerous chest x-ray readings. Thus, Drs. Wheeler and Scott read the x-rays dated December 10, 1986, October 11, 1994, December 20, 1994, December 31, 1994, February 24, 1995, and March 11, 1998 as negative for pneumoconiosis. (Er. Ex. 2, 4) These two physicians also reviewed a chest x-ray taken on February 9, 1999, as those findings are reported above. (Er. Ex. 2, 4)

Dr. Castle examined the Claimant on February 9, 1999, also reviewing the medical evidence of record by report dated August

30, 1999. (Er. Ex. 6) Based upon his review, as well as his examination, Dr. Castle concluded that the Claimant was not suffering from coal worker's pneumoconiosis. Upon reviewing the chest x-ray and CT scan of February 9, 1999, Dr. Castle did not find pneumoconiosis, simple or complicated, to be present. He did find old granulomatous disease to be present. (Er. Ex. 6, 8)

Dr. Castle's deposition was taken on October 6, 1999. (Er. Ex. 8) The pertinent portion of his testimony has been fully set forth in my prior decision and will not be repeated herein. In brief, Dr. Castle stated his agreement with the findings rendered by Drs. Wheeler and Scott, regarding why the changes found by CT scan were due to granulomatous disease and not pneumoconiosis.

The deposition of Dr. Wheeler was taken on October 13, 1999. (Er. Ex. 9) Dr. Wheeler testified that since May of 1995, the miner's chest had changed inasmuch as he had developed masses. The masses were all indicative of conglomerate tuberculosis, in his opinion. Upon review of a CT scan from 1995, Dr. Wheeler stated that there was no evidence of those masses, just nodules and coarse infiltrates. In his opinion, there was no evidence of pneumoconiosis.

Pursuant to Section 718.304, complicated pneumoconiosis can be established by means of x-ray evidence, autopsy or biopsy evidence or by "other means," as those are specified in §718.304(c). As there is no biopsy or autopsy evidence of record, complicated pneumoconiosis cannot be established pursuant to subsection (b). Furthermore, the chest x-ray readings as set forth above, and as set forth in Judge Barnett's decision and order of 1996, are insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

There are several newly submitted CT scan readings of record, those readings having been rendered by Drs. Wheeler, Scott, Naik Castle, and Navani. Drs. Wheeler, Castle and Scott found the CT scan evidence to be negative for complicated pneumoconiosis. Dr. Navani found the CT scan he read to be indicative of complicated pneumoconiosis, category A. I find his report sufficient to establish the existence of a condition which could reasonably be expected to yield results described in paragraphs (a) or (b) of Section 718.304. Thus, I find that the condition he diagnoses yields one or more opacities greater than 1 cm in diameter, which, therefore, would be classified as Category A. Indeed, his report clearly finds complicated pneumoconiosis, Category A. Therefore, I find the reading by Dr. Navani, of the March 11, 1998 CT scan, sufficient to establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Next to be determined is whether his positive reading is

outweighed by the negative CT scan readings of record, or by the negative chest x-ray readings of record.

When weighing the conflicting CT scan evidence under Section 718.304(c), I find the report of Dr. Navani, supported as it is by Dr. Naik's finding that the CT scan findings revealed a primary disease which was consistent with pneumoconiosis, sufficient to outweigh the readings of the CT scans as rendered by Drs. Wheeler and Scott of the CT scans from 1995, 1998 and 1999. I note that Drs. Wheeler and Scott found the changes to be consistent with tuberculosis, however, they did not have the benefit of the October 1994 hospital records which indicated that the miner did not have tuberculosis, when reaching their conclusions. That the diagnosis reached by these two physicians is specifically ruled out by laboratory testing renders their opinions worthy of lesser weight. Therefore, I find Dr. Navani's interpretation of the CT scan more persuasive than the interpretations rendered by Drs. Wheeler and Scott. I also find his interpretation sufficient to outweigh that of Dr. Castle, not only because Dr. Navani is a board certified radiologist, a qualification Dr. Castle lacks, but also because Dr. Castle relies heavily upon the reports of Drs. Wheeler and Scott, in rendering his opinion that complicated pneumoconiosis is not present. Thus, he also relies upon a finding that the miner suffers from tuberculosis.

Taking into account the above considerations, as well as considering the qualifications of the physicians at issue, I find the report of Dr. Navani to be worthy of the greatest weight. I conclude, based upon his finding of complicated pneumoconiosis, that the CT scan evidence is sufficient to establish same pursuant to 20 C.F.R. §718.204(c). When weighing the CT scan evidence with the chest x-ray evidence of record, I find the CT scan evidence to be the more probative, given the advanced and more sophisticated technology of the CT scan, and in particular, find Dr. Navani's interpretation of the March 11, 1998 CT scan sufficient to outweigh the contrary negative chest x-ray readings of record.

I would note as well that the chest x-ray evidence before Judge Barnett was predominantly positive for simple pneumoconiosis, lending further credence to Dr. Navani's findings, as opposed to the findings made by Drs. Wheeler, Scott and Castle, regarding the existence of any kind of pneumoconiosis, complicated or simple. Thus, Drs. Aycoth, Fisher, DeRamos, Bassali, Pathak and Shahan found the x-rays they read to be positive for pneumoconiosis, these physicians being B-readers and/or board certified radiologists. By contrast, Drs. Wheeler, Scott, Castle and Sargent found the x-ray evidence they read to be negative for the disease. Furthermore, Dr. Peterkin also read a CT scan in 1994, which he

found to be consistent with pneumoconiosis. Drs. Wheeler and Scott read a 1995 CT scan as negative for pneumoconiosis but positive for tuberculosis, a questionable diagnosis, given that the Claimant tested negative for the disease.

The evidence submitted in conjunction with the previous claim was insufficient to establish the existence of complicated pneumoconiosis. I find, however, that the newly submitted medical evidence, and in particular, the reading by Dr. Navani of the aforementioned CT scan is sufficient to establish a change in conditions. While, as discussed in detail above and in my prior decision, Drs. Scott and Wheeler found the changes to be consistent with tuberculosis, and as the Board notes, characterized the appearance of apical masses in claimant's lungs as inconsistent with a diagnosis of complicated pneumoconiosis, I do not find their conclusions in this respect to be particularly persuasive, given their insistence that the miner's condition was tuberculosis, a diagnosis specifically ruled out by testing.

Dr. Navani found complicated pneumoconiosis, Category A, in the right upper lobe. This is the finding which I find has not been refuted by the contrary probative evidence of record. Drs. Scott, Castle and Wheeler specifically found this to be tuberculosis, however, they also suggest the possibility of a histoplasmosis or a noninfectious granulomatous disease being present. I do not find their conclusions in this respect to be persuasive, given their primary reliance upon the conclusion that the disease which is present is tuberculosis, as well as the fact that they provide speculation rather than explanations and rationale for the secondary possibilities which they proffer.

In its decision, the Board suggested that consideration be given as to whether this case should be reopened in order to render justice under the Act. Upon remand, however, although the parties were afforded ample opportunity to file comments, no party requested reopening or suggested that reopening would foster the ends of justice. Under these circumstances, I find that reopening is neither warranted nor necessary.

For the reasons set forth in my prior decision and as detailed herein, I continue to find, based upon the CT scan reading rendered by Dr. Navani, that complicated pneumoconiosis has been established pursuant to 20 C.F.R. §718.304(c), a finding which is not outweighed by the contrary probative evidence of record. Therefore, the Claimant is entitled to the irrebuttable presumption set forth therein that he is totally disabled by pneumoconiosis. Accordingly, for all the foregoing reasons, a change in condition sufficient to establish

entitlement to benefits has been proven, and the order awarding benefits will be reinstated.

## ORDER

IT IS ORDERED that the Employer, Rhonda Coal Company, Inc:

1. Pay to Teddy J. Whited all benefits to which he is entitled under the Act commencing as of March 1, 1998, augmented by his two dependents but subject to offset for interim benefits he has received from the Black Lung Trust Fund;

2. Reimburse the Trust Fund for the interim payments made to the Claimant.

3. Provide the Claimant with medical care for his pneumoconiosis effective from March 1, 1998.

A

STUART A. LEVIN

Administrative Law Judge

Notice of Appeal Rights:

Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within 30 days from the date of this decision, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2117, 200 Constitution Avenue, NW, Washington, D.C. 20210.